

DISTRICT COURT  
SAN JUAN COUNTY NM  
*JB* FILED

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STATE OF NEW MEXICO  
COUNTY OF SAN JUAN  
ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.*  
THE STATE ENGINEER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

**AB-07-1**

Claims of Navajo Nation

No. CV 75-184

Honorable James J. Wechsler

Presiding Judge

DESCRIPTIVE SUMMARY: During the June 11-12 hearings, the defendants raised some issues of law and fact which came to light recently, such as section 8 of the Reclamation Act of 1902 and section 13(c) of the 1962 NIIP Act. By their "motion to strike," the settling parties are asking the court to disregard these statutes.

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RESPONSE TO US-NN MOTION TO STRIKE  
NOTICE CONCERNING AMENDMENTS TO OBJECTIONS

During the hearings in Aztec on June 11 and 12, the community ditches and the other defendants raised a number of new issues of law and fact which have emerged since they filed objections in the fall of 2012. For example, the defendants raised section 8 of the Reclamation Act of 1902, which requires beneficial use; section 13(c) of the 1962 NIIP Act, wherein Congress disclaimed the creation of any water rights; and NMSA 1978, § 72-5-7, which requires the United States to make unused storage capacity in Navajo Reservoir available to other water users on the San Juan River.

The parties and the court discussed these newly emergent issues during the hearings on June 11 and 12, and shortly thereafter the Community Ditch Defendants filed a list of them to conform the record to what had already occurred at the hearing. See Rule 1-015(B) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

In response, the United States and the Navajo Nation have filed a so-called "motion to strike," apparently asking the court to disregard all these important points of law and fact. According to the US and NN, the defendants cannot be allowed to supplement their objections, because those objections were frozen in time by the initial pleadings. Even though the pleadings were filed before discovery began. And even though there are no pleadings, according to the US and NN.

In this putative "motion to strike" the US and NN are pleading with the court to disregard the governing law. Section 8 of the Reclamation Act requires beneficial (nonwasteful) use of water, so the settling parties want the court to ignore that section of the statute. [The beneficial use requirement is now codified as 43 U.S.C. § 372.]

Likewise, the US and NN are begging the court to disregard section 13(c) of the 1962 NIIP Act. The settling parties have argued for years that Congress established water rights for NIIP when it passed the NIIP statute. However the statute says exactly the opposite: "No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by this Act . . . ." Pub. L. No. 87-483, 76 Stat. 96, 101 (Jun. 13, 1962).

The settling parties should have brought section 13(c) to the court's attention years ago. Now that this section has come to light, the settling parties are asking the court to

disregard it. Since the settling parties have no answer to section 13(c), they want it to disappear from this case, as if the court were free to disregard governing law.

In essence, the motion to strike is a plea to the court, "Please Judge, make these statutes go away."

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

Victor R. Marshall  
Attorneys for San Juan Agricultural Water Users  
Association; Hammond Conservancy District;  
Bloomfield Irrigation District; various ditches; and  
various members thereof.  
12509 Oakland NE  
Albuquerque, NM 87122  
505-332-9400 / 505-332-3793 FAX

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2013, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of said document to an email sent to the following list server: [wnavajointerse@nmcourts.gov](mailto:wnavajointerse@nmcourts.gov) and to the filing list referred to in the Notice of Amended Service List filed February 25, 2013.

/s/ Victor R. Marshall

Victor R. Marshall, Esq.